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No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1960

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the District Court (Appendix A, *infra*, pp. 30–46) is in 182 F. Supp. 81. The report of the Interstate Commerce Commission is in 300 I.C.C. 453.

JURISDICTION

This action was instituted to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission dated May 10, 1957, pursuant to the provisions in 49 U.S.C. 1958 ed. § 17(9); 28 U.S.C. 1958 ed. §§ 1336, 1398, 2284, 2321–2325; and 7 U.S.C. 1958 ed. § 1291(b). The judgment of the District Court

was entered on March 25, 1960, and a notice of appeal was filed in the District Court by the Secretary of Agriculture on May 23, 1960. The jurisdiction of this Court is conferred by 28 U.S.C. 1958 ed. §§ 1253 and 2101(b), and the case is reviewable on direct appeal. See, *e.g.*, *United States* v. *The Union Pacific Railroad Co.*, 351 U.S. 321; *Secretary of Agriculture* v. *United States*, 350 U.S. 162; *Secretary of Agriculture* v. *United States*, 347 U.S. 645.

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1958 ed. §§ 1(3)(b), 1(4), 3(1), 3(4), 5(2), 6(1), 15(1), 15(3), and 15(4)) are set forth in Appendix B, *infra*, pp. 47–53.

QUESTIONS PRESENTED

The Spokane, Portland and Seattle Railway System (S.P. & S. System) maintains joint rates as to all commodities with the Great Northern Railway Company and the Northern Pacific Railway Company (collectively referred to as the Northern Lines), but—with limited exceptions—not with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road). The Milwaukee Road competes with the Northern Lines. The Interstate Commerce Commission concluded that, with limited exceptions, through routes do not presently exist between the S.P. & S. System and the Milwaukee Road, and the Commission rejected the contention, based on §§ 1(4), 3(1), and 3(4) of the Interstate Commerce Act, that the S.P. & S. System is required to establish additional competitive joint rates with the Milwaukee

Road. The Commission refused to compel the S.P. & S. System to establish additional through routes and competitive joint rates with the Milwaukee Road under § 15 of the Act. The basic facts, as distinguished from the ultimate conclusions of the Commission, are generally undisputed. The District Court affirmed the decision of the Commission In the circumstances, the questions presented are:

1. Whether the Commission properly applied the appropriate criteria in determining that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road?

2. Whether the Commission properly applied the appropriate criteria in failing to conclude that the S.P. & S. System is required to establish just and reasonable joint rates applicable to the existing through routes with the Milwaukee Road under § 1(4) of the Act; and whether the Commission properly applied the appropriate criteria in concluding that the S.P. & S. System is not violating the provisions of § 3(1) of the Act relating to undue preferences or prejudices or § 3(4) of the Act relating to discrimination against a connecting line?

3. Whether the Commission erred in failing to determine and prescribe just and reasonable joint rates under § 15(1) of the Act with respect to shipments made over the Milwaukee Road and the S.P. & S. System, in view of the violations by the S.P. & S. System of §§ 1(4), 3(1), and 3(4) of the Act?

4. Assuming, *arguendo,* that with limited exceptions through routes do not exist between the S.P. & S. System and the Milwaukee Road, whether the Com-

mission properly applied the appropriate criteria in concluding that it should not require the S.P. & S. System to establish through routes and joint rates with the Milwaukee Road under the provisions of § 15 (3) and (4) of the Act?

5. As one of the questions subsidiary to Question 4, *supra*, whether the Commission properly determined the question presented in this case for the first time as to whether the S.P. & S. System can, within the meaning of § 15(4) of the Act, be "operated in conjunction and under a common management or control" with two other railroads, *viz.*, the Northern Lines, each of which owns 50% of the stock of the S.P. & S. System, inasmuch as the two other railroads are admittedly not operated under common management or control and, admittedly, neither of the two other railroads can determine independently the transportation policy of the S.P. & S. System?

6. Whether adequate findings were made by the Commission, and whether substantial evidence on the record as a whole supports the Commission's findings and conclusions with respect to each of the foregoing questions?

STATEMENT

This action was instituted in the United States District Court for the Eastern District of Wisconsin by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) against the United States, the Interstate Commerce Commission, the Spokane, Portland, and Seattle Railway Company, the Great Northern Railway Company, and the Northern Pacific Railway Company. Ezra Taft Benson,

Secretary of Agriculture of the United States, intervened as a plaintiff in the District Court, together with the National Livestock Producers Association, the American National Cattlemen's Association, the National Wool Growers Association, and the Chicago Producers Commission Association. Six railroad companies intervened as defendants.

Because of the widespread importance of this case to a substantial segment of the agricultural community, see, *infra*, pp. 9–11, the Secretary of Agriculture intervened pursuant to § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. 1958 ed. § 1291), which authorizes the Secretary to participate as a party in proceedings before the Interstate Commerce Commission with respect to "rates, charges, tariffs, and practices relating to the transportation of farm products" (7 U.S.C. 1958 ed. § 1291(a)). In such cases "the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U.S.C. 1958 ed. § 1291(b)). See, also, § 203(j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U.S.C. 1958 ed. § 1622(j)).

The Spokane, Portland and Seattle Railway Company and its subsidiaries, *viz.*, the Oregon Electric Railway Company and the Oregon Trunk Railway (hereinafter collectively referred to as the S.P. & S. System), operate 950 miles of rail lines in Washington and Oregon, terminating in the east at Spokane, Washington (300 I.C.C. 453, 461–462). The Mil-

waukee Road operates approximately 10,600 miles of rail lines, including rail lines from Chicago, St. Paul, and Minneapolis to Spokane and, also, to points west of Spokane (*id.* at 462). The Milwaukee Road is in competition with the Northern Lines, *viz.*, the Great Northern Railway Company and the Northern Pacific Railway Company. Specifically, the Northern Lines compete with the Milwaukee Road for eastbound and westbound traffic passing through Spokane (*id.* at 471–484).

The S.P. & S. System has through routes and joint rates[1] applicable with respect to all commodities in connection with eastbound and westbound shipments passing through Spokane made via the S.P. & S. System and the Northern Lines (300 I.C.C. 453, 499–501). With respect to some of the shipments passing through Spokane made over the S.P. & S. System and the Milwaukee Road, combination rates are applicable,[2] and the combination rates produce higher charges than those resulting from the joint rates

[1] As we show, *infra*, pp. 12–14, a through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods. The test of a through route is whether the participating carriers hold themselves out as offering through transportation service. Either combination rates, *i.e.*, separate rates fixed independently by the participating carriers, or joint rates, *i.e.*, single rates charged shippers with appropriate divisions of the single rates by the participating carriers, may apply over through routes (see 49 U.S.C. 1958 ed. § 6(1)).

[2] Joint rates have been established as to shipments made over the S.P. & S. System and the Milwaukee Road with respect to certain commodities and circumstances (300 I.C.C. 453, 458, 501–502). No issue is presented in this case with respect to the level of such joint rates.

maintained by the S.P. & S. System with the Northern Lines (*id.* at 457). This controversy centers on issues relating to the higher charges applicable to such shipments over the Milwaukee Road and the S.P. & S. System.

It is the position of the appellants that, with respect to all commodities, through routes are existent between the S.P. & S. System and the Milwaukee Road, and that under §§ 1(4), 3(1), and 3(4) of the Interstate Commerce Act (49 U.S.C. 1958 ed. §§ 1(4), 3(1), and 3(4)), additional joint rates should be established by the S.P. & S. System with the Milwaukee Road which are competitive with the joint rates of the S.P. & S. System with the Northern Lines. Based on the premise that such through routes are in existence as to all commodities, we contend that the Commission should have prescribed such additional competitive joint rates under § 15(1) of the Act (49 U.S.C. 1958 ed. § 15(1)), because of the violations of §§ 1(4), 3(1), and 3(4) of the Act by the S.P. & S. System. The Commission determined that, with certain exceptions,[3] through routes do not exist between the S.P. & S. System and the Milwaukee Road (300 I.C.C. 453, 457–461) and, therefore, the Commission did not determine whether additional competitive joint rates should be established between the S.P. & S. System and the Milwaukee Road pursuant to § 15(1) of the Act (49 U.S.C. 1958 ed. § 15(1)).

[3] The exceptions relate to the presently established joint rates between the S.P. & S. System and the Milwaukee Road referred to in footnote 2, *supra*, p. 6.

Assuming, *arguendo,* that with limited exceptions through routes do not exist between the S.P. & S. System and the Milwaukee Road, the appellants contend that the Commission should establish additional through routes and competitive joint rates between the S.P. & S. System and the Milwaukee Road pursuant to § 15(3) of the Act (49 U.S.C. 1958 ed. § 15(3)). In considering the issue as to whether through routes and joint rates should be established under § 15(3) of the Act (49 U.S.C. 1958 ed. § 15(3))—which authorizes the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest"—the Commission determined that the "short-hauling" provisions of § 15(4) of the Act are applicable (49 U.S.C. 1958 ed. § 15(4)), and the Commission's conclusion that through routes are not necessary or desirable in the "public interest" is based on the limitations in § 15(4) of the Act as to "short-hauling" (300 I.C.C. 453, 463–471, 498). Section 15(4) is a limitation on the Commission's power to prescribe through routes and joint rates under § 15(3) of the Act, and the limitation prevents the Commission, with certain exceptions, from requiring a railroad to "short-haul" itself, *i.e.,* "to embrace in such [through] route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route."[4] The

[4] The limitation in § 15(4) of the Act is not relevant with respect to existing through routes between the Milwaukee Road and the S.P. & S. System, see, *infra,* p. 12.

Commission determined that the S.P. & S. System is operated in conjunction and under a common management or control with the Northern Lines and that the Northern Lines would be "short-hauled" if the relief requested by the appellants is granted (300 I.C.C. 453, 463–471). In the circumstances, the Commission held that it could not establish through routes and joint rates unless one of the exceptions to § 15(4) applies, *viz.*, unless the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation" or "except as provided in § 3" of the Act relating to unlawful discrimination (300 I.C.C. 453, 457, 471, 498).

The Commission concluded that neither of the relevant exceptions to § 15(4) of the Act is applicable (300 I.C.C. 453, 498). The conclusion by the Commission that the additional through routes are not needed in order to provide adequate and more efficient or economic transportation with respect to various commodities, including forest products, livestock, and fresh fruits and vegetables, is contrary to the determination by the Hearing Examiner in this case. The Commission's conclusion that the S.P. & S. System is not violating § 3 of the Act, with respect to undue prejudice to shippers using the Milwaukee Road for the shipment of such commodities, is also contrary to the determination by the Hearing Examiner.

Testimony was introduced at the administrative hearing showing that, during the present period of increased production and expanding markets, the agricultural community requires flexible and expeditious

channels for the distribution of its crops (300 I.C.C. 453, 478). All areas of consumption are needed for the disposal of production and all means of reaching those areas are important (Tr. 1029; Exs. 19 and 20). Large quantities of agricultural commodities are produced in and distributed from Oregon and Washington, and Spokane is an important gateway for their distribution (300 I.C.C. 453, 478). The inability to use an important gateway such as Spokane at joint competitive rates between the S.P. & S. System and the Milwaukee Road prevents the necessary flexible distribution of agricultural commodities by producers and shippers (*ibid.*).

The evidence on behalf of the appellants shows that the inability of livestock producers on the S.P. & S. System to utilize the range along the Milwaukee Road for feeding-in-transit while enroute; *e.g.*, to Chicago, without the payment of the higher combination freight rates, is discriminatory (300 I.C.C. 453, 492–494). The desirable ranges along the Northern Lines are crowded at times, while ranges are available along the Milwaukee Road (Tr. 260, 1282–1284).

Producers of grain who are adjacent to the Milwaukee Road, and who desire to ship to the West, can sell to mills on the lines of the S.P. & S. System, after the required inspection at Spokane, only at a penalty in freight charges, which affects their market prices (300 I.C.C. 453, 487–489; Tr. 553–555, 635–637, 1213). Because of the lack of joint rates with diversion privileges applicable to shipments of grain, the amount of grain shipped on the Milwaukee Road towards Spokane is limited to that which will probably

be disposed of at destinations on the Milwaukee Road, resulting in frequent shortages at such destinations (300 I.C.C. 453, 488). Shipments of forest products and fresh fruits and vegetables originating on the S.P. & S. System moving to local points on the Milwaukee Road cannot be diverted eastbound off of the Milwaukee Road without rate penalties because the tariffs provide that in such instances combination rates, which are higher, must be applied (300 I.C.C. 453, 472, 484–486, 489). The absence of joint rates between the Milwaukee Road and the S.P. & S. System on various agricultural commodities also prevents shippers from utilizing other in-transit privileges on the Milwaukee Road, such as milling-in-transit or partial loading or unloading in-transit (300 I.C.C. 453, 476–479).

In the circumstances, it is the position of the Secretary of Agriculture that it is in the public interest to open the Spokane gateway to shipments between the S.P. & S. System and the Milwaukee Road by establishing additional competitive joint rates applicable to such shipments (300 I.C.C. 453, 478).[5]

THE QUESTIONS ARE SUBSTANTIAL

1. We shall show, in this part of the Jurisdictional Statement, that the Commission applied an erroneous

[5] It is the Congressional policy to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, marketing aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed" (60 Stat. 1087, 7 U.S.C. 1958 ed. § 1621).

criterion in determining the issue—basic to the entire case—as to whether through routes as to all commodities exist between the S.P. & S. System and the Milwaukee Road. In the circumstances, the case should be remanded to the Commission, as in *American Trucking Associations, Inc.* v. *United States,* No. 74, October Term 1959, decided June 27, 1960, so that the Commission may apply the appropriate criteria to the facts. Assuming, however, that the issue may be decided without remanding the case to the Commission, we submit that in view of all of the relevant facts and circumstances in the record through routes are in existence between the S.P. & S. System and the Milwaukee Road as to all commodities.

The Commission's conclusion that, with limited exceptions, through routes do not exist between the S.P. & S. System and the Milwaukee Road is basic to the Commission's decision in this case (300 I.C.C. 453, 457–461), and a reversal, in this respect, would require reconsideration of the case by the Commission inasmuch as the Commission decided the case on the basis of findings under § 15(3) and 15(4) of the Act, *e.g.,* as to the need for additional transportation services (300 I.C.C. 453, 471, 498), and such findings are irrelevant if through routes already exist. *Great Northern Ry. Co.* v. *United States,* 81 F. Supp. 921, 924–925 (3-Judge Court, D. Del.), affirmed, 336 U.S. 933; *Virginian Ry.* v. *United States,* 272 U.S. 658, 666–667.

No express agreement by connecting carriers is necessary in order to establish a through route. *Thompson* v. *United States,* 343 U.S. 549, 556; *St.*

Louis S. W. Ry. Co. v. *United States,* 245 U.S. 136, 139, fn. 2. "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.'* It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation." *Thompson* v. *United States,* 343 U.S. 549, 556. See, also, *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 572–573. "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." *Thompson* v. *United States, supra,* 343 U.S. at 557.

The Commission recognized in *Through Routes And Through Rates,* 12 I.C.C. 163, 167–168, which is cited in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.,* 351 U.S. 321, 327, that "it is settled that, whatever other facts or incidents of a shipment may serve to prove

* A joint rate is a rate over two or more railroad lines published jointly by the railroads, with appropriate divisions of the joint rate being made by the participating carriers, whereas a combination rate is a rate published by a carrier for its portion of the rail shipment. *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 566.

the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of such through route," and "through routes to certain points may be indicated by the presence of through routes to other points on the same line, although the carrier may not have intended such result."

In the case at bar, the Commission afforded decisive weight to the circumstances showing that the Spokane gateway is, with certain exceptions, "commercially closed" to the Milwaukee Road by high combination rates. The Commission stated that (300 I.C.C. 453, 457):

> Routes are available to and from points on the S.P. & S., via Spokane in connection with the complainant [Milwaukee Road] and its eastern connections, but generally shippers would have to pay combination rates if such routes were used. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the S.P. & S. over routes via Spokane in connection with the northern lines. The higher rates and charges act as deterrents to shippers, and, in effect, close the Spokane gateway in a commercial sense insofar as the complainant is concerned.

The Commission iterated its holding that "as testified by numerous shippers in this proceeding, the Spokane-gateway routes, insofar as the complainant's lines are concerned, with the exceptions listed in Appendix B, are not considered as open or through routes commercially, but as routes that are effectually closed to shippers because of the higher combination

rates which apply thereover. A finding that such routes should be opened to shippers on a commercial basis by establishing the competitive joint rates sought would result in the establishment of such routes as effective through routes" (300 I.C.C. 453, 458).

The Commission's holding that through routes are not in existence here because the Spokane gateway is "commercially closed" is contrary to *Virginian Ry.* v. *United States, supra,* 272 U.S. 658, 661–667, in which it was held that through routes were in existence notwithstanding the fact that the routes were closed commercially. In that case, the shipment of coal from 54 mines to the West was possible through a junction of the Virginian Railway and the Chesapeake & Ohio Railway. The Court stated that the "route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of [1] the Virginian's local rate from the mines to the junction with [2] the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive" (272 U.S. at 661). Nonetheless, the Court stated that "[t]hrough routes to the West were already in existence. * * * The fact that the combination rates were excessive constituted the only obstacle to the movement." *Id.* at 666. Hence the fact that the routes were closed commercially and that shipments were not made over the routes because the combination charges were prohibitive did not negative the existence of the through routes. This doctrine was applied in *Great Northern Ry. Co.* v. *United States, supra,* 81 F.

Supp. 921, 924–925 (3-Judge Court, D. Del.), affirmed 336 U.S. 933.

It is settled that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *American Trucking Associations, Inc.* v. *United States, supra,* No. 74, October Term 1959, decided June 27, 1960, p. 12 of slip opinion, quoting from *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80, 87. As we have shown, *supra,* pp. 12–16, the Commission's order is based on an erroneous legal conclusion and, therefore, the proceeding should be remanded to the Commission so that it may apply the proper criteria to the facts. *Ibid.*

Assuming, however, that the issue as to the existence of through routes may be resolved at this time by the Court, it is our position that the record shows that through routes are in existence between the Milwaukee Road and the S.P. & S. System as to all commodities. The Commission found that "[r]outes are available to and from points on the S.P. & S., via Spokane in connection with the complainant [Milwaukee Road] and its eastern connections" (300 I.C.C. 453, 457). That finding compels the Commission, in the circumstances of this case, to conclude that through routes are in existence irrespective of whether the routes are "commercially closed."

The fact that through routes are in existence between the Milwaukee Road and the S.P. & S. System as to all commodities is shown by uncontradicted evidence. The Commission lists, in Appendix B to its report (300 I.C.C. 453, 501–502), joint rates which

have been established between the Milwaukee Road and the S.P. & S. System over routes which are admittedly through routes insofar as the joint rates are applicable (300 I.C.C. 453, 458).[7] For example, joint rates apply over through routes on all general commodities for export or import between the S.P. & S. System and the Milwaukee Road (300 I.C.C. 453, 501). Also, "there has been published or approved a full line of joint through rates on * * * [forest products] from all points on the S.P. & S. to all local points and some common points on the lines of the Milwaukee east of Spokane" (300 I.C.C. 453, 458). Hence as to such shipments of forest products, through routes are admittedly in existence, and the appellants' contentions, as to such shipments, are limited to the establishment of additional joint rates over the existing through routes, including additional diversion privileges. In addition, numerous other joint rates, over admittedly through routes (300 I.C.C. 453, 458), are set forth in Appendix B to the Commission's report (300 I.C.C. 453, 501–502). These joint rates include almost every commodity that can be transported to or from thousands of points on the Milwaukee Road and its many connections (300 I.C.C. 453, 501–502). The numerous through routes and joint rates between the S.P. & S. System and the Milwaukee Road compel the conclusion that through routes are in existence between these lines via Spokane with respect to all commodities.

[7] It is undisputed that the publication of joint rates, as a matter of law, "presupposes through routes." *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 7, 17.

The foregoing conclusion is supported by additional circumstances. The interchange of cars between the Milwaukee Road and the S.P. & S. System is effected daily with expedition and a minimum of expense (Tr. 1368–1371). During the representative year of 1952, relied upon by the Commission (300 I.C.C. 453, 460), 513 cars of freight *shipped on through bills of lading* were handled by the S.P. & S. System and the Milwaukee Road with the interchange made at Spokane (300 I.C.C. 453, 460–461). The 513 cars contained the following commodities (300 I.C.C. 453, 460; Exhibit 1): livestock, forest products, insecticides and fungicides, food products in cans and packages, candy, confectionery, laundry equipment, starch, chemicals, soap, cleansing and washing compounds, furniture, gasoline and other petroleum products, containers, motor vehicles, and miscellaneous commodities. The Commission asserts in its report (300 I.C.C. 453, 460, 472) that the 513 cars interchanged at Spokane moved only on joint rates which had been established between the S.P. & S. System and the Milwaukee Road,[8] but the uncontradicted evidence shows that only 387 of such cars moved under joint rates (Tr. 90–91), and, therefore, 126 cars moved via Spokane under the higher combination rates. Hence a substantial number of shipments were made at the combination rates.

The Commission's erroneous view that all of the 513 cars moved on joint rates is significant inasmuch as the 513 cars admittedly moved on "through bills

[8] The Commission recognized that through routes exist between the S.P. & S. System and the Milwaukee Road insofar as the joint rates are applicable (300 I.C.C. 453, 458).

of lading" (300 I.C.C 453, 460), and as we have shown, *supra,* pp. 13–14, the Commission has held that "a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of such through route" (12 I.C.C. 162, 167–168). If that prior holding is applied to the facts as they exist in this case, the fact that 126 shipments were made on through bills of lading at the higher combination rates is "conclusive evidence" that through routes exist as to such shipments made on the combination rates.[9]

2. Assuming, *arguendo,* that the case should not be remanded for the reasons set forth *supra,* pp. 11–16, and that with limited exceptions through routes do not presently exist between the S.P. & S. System and the Milwaukee Road, the Commission "may, and it shall whenever deemed by it to be necessary or desirable in the public interest," establish through routes and joint rates under § 15(3) of the Act (49 U.S.C. 1958 ed. § 15(3)). However, the Commission may not, with certain exceptions, "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of *its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith,* which lies between the termini of such proposed through route [emphasis supplied]" (49 U.S.C. 1958 ed. § 15(4)). This limitation is referred to as the

[9] To be sure, the Commission held in *Beaman Elevator Co. v. Chicago & N.W. Ry. Co.,* 155 I.C.C. 313, 314–315, that a single shipment made on a through bill of lading which was issued by mistake does not establish the existence of a through route, but that case is not analogous to the case at bar.

limitation against "short-hauling." No issue is presented as to the S.P. & S. System being short-hauled inasmuch as Spokane is the eastern terminal of the S.P. & S. System. However, the Commission concluded that the Northern Lines are "operated in conjunction and under a common management or control" with the S.P. & S. System and that the Northern Lines would be short-hauled if the proposed through routes and joint rates were established (300 I.C.C. 453, 463–471, 494–499). The Commission made no finding, free from the short-hauling limitations, as to whether the establishment of through routes under § 15(3) of the Act is necessary or desirable in the public interest. If the short-hauling limitations are inapplicable, the case would have to be remanded to the Commission for consideration of the issues apart from the short-hauling limitations. Also the issue of discrimination against the Milwaukee Road, under § 3(4) of the Act (49 U.S.C. 1958 ed. § 3(4)), would have to be reconsidered by the Commission.

We shall show, briefly, that (1) the S.P. & S. System is not operated in conjunction and under a common management or control with the Northern Lines within the meaning of § 15(4) of the Act, and (2) as a matter of statutory construction, only a single railroad can operate or control another railroad within the meaning of § 15(4) of the Act. The basic facts, as distinguished from the Commission's ultimate conclusions, with respect to the operation and management of the S.P. & S. System and the Northern Lines are not in dispute.

The two railroads referred to as the Northern Lines, *viz.*, the Great Northern Railway Company and the Northern Pacific Railway Company, are competitive lines (300 I.C.C. 453, 462–463; Tr. 2559). "Both the stock and the bonds of the S.P. & S. are owned in equal shares by the Great Northern and the Northern Pacific" (300 I.C.C. 453, 463). The S.P. & S. System depends equally on the Northern Lines for financial support and car supply (*id.* at 463–464). The presidents of the Northern Lines alternate each year as president and vice president of the S.P. & S. System (*id.* at 465). Also, the S.P. & S. System has its own vice president in charge of its operating department (*id.* at 465). "Although in each year one northern-line president is the president of the S.P. & S. and the other is vice president, there is no difference in the authority exercised by each except in the title used in signing documents". (*id.* at 466).

The "freight traffic practices and policies of the S.P. & S. are directed and controlled jointly by the traffic departments of the northern lines, [but] the local officials of the S.P. & S. are authorized to act within the framework of policies determined by the northern lines without specific approval from the traffic departments of the latter on each question which arises" (*id.* at 466). The S.P. & S. System is a member of the North Pacific Coast Freight Bureau with full voting powers (Tr. 138–139), and it issues its own rate instructions to the Transcontinental Freight Bureau in matters involving it (Tr. pp. 1992, 3491). Generally, with respect to the S.P. & S. System's local territory, the S.P. & S. System is permitted, without specific

approval in advance, to place rate and practice matters on the North Pacific Coast Freight Bureau docket to be handled in the regular course of business (300 I.C.C. 453, 466). All matters pertaining to transcontinental rates and practices are handled for the S.P. & S. System by the representatives of the Northern Lines (*ibid.*). With respect to rates on traffic other than transcontinental traffic and not applicable to the S.P. & S. System's local territory, the proposed rates of the S.P. & S. System must be submitted in advance to the Northern Lines, and if the Northern Lines are not in agreement, the S.P. & S. System "is permitted to exercise its best judgment in voting" (*ibid.*).

All decisions by the Northern Lines relating to the S.P. & S. System are made jointly (Tr. 2562, 2613, 2641). In case of disagreements between them—and such disagreements occur fairly often—no action is taken by them (Tr. 2557–2559, 2653, 2823–2825), and the S.P. & S. System exercises its independent judgment in such matters (Tr. 3321, 3496–3498). The S.P. & S. System has its own corporate organization (Tr. 2640); prepares its own operating budgets (Tr. 2641); assumes all liability on its equipment trust obligations (Tr. 2693); and does its own traffic solicitation (Tr. 3330).

In its relations with other carriers, the S.P. & S. System acts wholly independently of the Northern Lines and is treated as an independent line (Tr. 138, 2829, 2836, 3850–3854). On numerous occasions it has joined with the Great Northern Railway Company and the Milwaukee Road in publishing rates

competitive with those applicable via the S.P. & S. System and the Northern Pacific Railway Company (Tr. 3854). The S.P. & S. System negotiates divisions of rates with all lines, including the Northern Lines (Tr. 3523). In short, the Northern Pacific and the Great Northern have separate, competitive managements (Tr. 2559), and the S.P. & S. has a management separate from that of the Northern Lines (Tr. 2640–2641; 300 I.C.C. 453, 465–466). In the circumstances, the S.P. & S. System is not operated in conjunction and under a common management or control with the Northern Lines within the meaning of § 15(4) of the Act.

The District Court sustained the decision of the Commission on the basis that the S.P. & S. System is controlled by the Northern Lines. The District Court recognized that "neither the Northern Pacific nor the Great Northern can individually control the S.P. & S." and that "there is no question but that the language of the statute [with respect to short-hauling] is framed in the singular, and, therefore, such a situation [*i.e.*, joint control by two railroads over a third railroad] does not fall within the precise wording of [§ 15(4) of] the Act" (Appendix A, *infra*, p. 36). In the circumstances, the issue is whether the Court should depart from the language of § 15(4) of the Act.

We submit that there is no basis for changing, by construction, the language of § 15(4) of the Act. In the Transportation Act of 1940, a definition was added to the Interstate Commerce Act providing that for the

purpose of certain sections of the Act—not including § 15(4) at issue in the case at bar—the term control "shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control" (49 U.S.C. 1958 ed. § 1(3)(b)). The "Conference Committee Report on the Transportation Act of 1940 * * * points out that this definition of 'control' was added in order to make applicable to specified sections of the Act * * * [not including § 15(4)] the benefit of the interpretation of this Court in *Rochester Telephone Co.* v. *United States,* 307 U.S. 125, 145–6, of the similar definition of 'control' in § 2 of the Communications Act of 1934 * * *. In that case this Court had emphasized the breadth of the statutory language as embracing every type of control in fact." *United States* v. *Marshall Transport Co.,* 322 U.S. 31, 38.

In the *Rochester Telephone Co.* case, *supra,* 307 U.S. at 144–146, the Court sustained a finding that the Rochester Telephone Company is "under the control" of the New York Telephone Company based primarily on the circumstances that the New York Company held one-third of the stock of the Rochester Company and was able to elect five of the 15 members of the Board of Directors and two of the five members

of the Executive Committee of the Rochester Company. Based on the "actualities in such intercorporate relations" (307 U.S. at 146), the Court sustained the finding that the one-third ownership of the Rochester Company by the New York Company was sufficient to give the New York Company control of the Rochester Company. But in the case at bar, inasmuch as each of the Northern Lines has 50 percent of the ownership of the S.P. & S. System, neither railroad can control the S.P. & S. System even within the liberal definition of control reflected in the *Rochester Telephone* case.

The legislative history of the 1940 amendatory measure specifically shows that the new, liberalized definition of control was not made applicable to § 15 (4) of the Act relating to the short-hauling provisions inasmuch as it was "thought undesirable to make any change in the interpretation of present law" in this respect. H. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63; H. Rep. No. 2016, 76th Cong., 3rd Sess., p. 58. The District Court recognized that under the interpretations of § 15(4) of the Act at the time of or prior to the amendatory legislation the Commission had never held that joint ownership by two or more railroads is sufficient, under § 15(4) of the Act, to constitute "common management or control" (Appendix A, *infra*, pp. 41–42, 45–46). Contrariwise, the Commission had held, prior to the amendatory legislation in 1940, that joint ownership was not sufficient to constitute common management or control within the meaning of § 15(4) of the Act. *Absorption of Switching*

Charges, 157 I.C.C. 129, 132; *Manufacturers Ry. Co. v. Ahnapee & W. Ry. Co.*, 172 I.C.C. 554, 560–564."[10]

To be sure, the Commission held in some cases prior to the amendatory legislation in 1940 that in situations not involving § 15(4) of the Act a railroad jointly owned by two or more railroads may be considered as part of the system of the joint owners (Appendix A, *infra*, pp. 39–41), but there is no legislative history showing that the Congress intended that such decisions would also be applied under § 15(4) of the Act relating to short-hauling.

In the circumstances, in the absence of a clear indication to the contrary, the words of the Act should be interpreted as they are written. When the Congress intended to refer to joint ownership, it used appropriate language. For example, in the 1940 amendatory legislation, the Congress provided that it shall be lawful, with the approval and authorization of the Commission, "for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise" (49 U.S.C. 1958 ed. § 5(2)). If the Congress had intended for joint ownership or joint control to be sufficient under § 15(4) of the Act, it could similarly have indicated its intention in that respect.

[10] These cases involved a terminal railroad which was jointly owned by 15 connecting railroads with a collective management and control by a majority of the 15 railroads. The Commission held that the terminal railroad and its owners were not operated in conjunction and under a common management or control within the meaning of § 15(4) of the Act. The same holding as to joint ownership and control by 15 railroads is equally applicable to joint ownership and control by 2 railroads.

3. We have shown, *supra,* pp. 12–26, that the short-hauling provisions of § 15(4) of the Act are not applicable, but assuming, *arguendo,* that the provisions of § 15(4) are applicable, we submit that under the facts referred to in our Statement, *supra,* pp. 9–11, the Commission erred in failing to establish through routes and competitive joint rates between the Milwaukee Road and the S.P. & S. System inasmuch as (1) such routes and rates are needed "in order to provide adequate, and more efficient or more economic, transportation" (49 U.S.C. 1958 ed. § 15(4)),[11] and (2) such routes and rates are needed in order to eliminate the "undue or unreasonable prejudice or disadvantage" (49 U.S.C. 1958 ed. § 3(1)) suffered by shippers on the lines of the Milwaukee Road. Either of the foregoing circumstances justifies an order to establish through routes and joint rates even if it results in short-hauling a carrier. 49 U.S.C. 1958 ed. § 15(4).

Numerous shippers and consignees who are adjacent to the lines of the Milwaukee Road testified that because of the rate disparities they cannot compete effectively with shippers and consignees located on the Northern Lines (Tr. 174–176, 298–301, 318–320, 528–529, 554, 1013, 1953). Joint competitive rates with respect to shipments over the Milwaukee Road and the S.P. & S. System are needed to provide adequate, and

[11] "Adequate transportation" means adequate from the standpoint of the shipping public, and "more efficient or more economic, transportation" embraces both shippers' and carriers' interests. *Pennsylvania R. Co.* v. *United States*, 323 U.S. 588, 591–593.

more efficient or economic transportation and to eliminate discrimination against shippers and consignees on the lines of the Milwaukee Road. The Commission has the authority to prevent such discrimination in the circumstances of this case. "Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails' reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it." *St. Louis S.W. Ry. Co.* v. *United States,* 245 U.S. 136, 144. See, also, *Chicago, I. & L. Ry.* v. *United States,* 270 U.S. 287, 292–293.

4. With respect to each of the foregoing points, we have shown that the findings of the Commission are not properly supported by the evidence, and adequate findings do not support the administrative order.

CONCLUSION

For the foregoing reasons, we believe that the questions presented by this appeal are substantial and of public importance, and that the judgment of the District Court should be reversed, the Commission's order of May 10, 1957, should be set aside and enjoined, and the proceeding should be remanded to the Commission. Under our arguments set forth *supra,* pp. 11–16, 20, 28, it is appropriate to remand the case to the Commission for further consideration of the issues presented on this appeal. If, however, the issues are resolved in our favor without further consideration by the Commission, a remand to the Commission

would, nonetheless, be necessary so that the Commission could enter an appropriate order prescribing competitive joint rates between the Milwaukee Road and the S.P. & S. System.

Respectfully submitted.

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AUGUST 1960.

APPENDIX A

United States District Court, Eastern District of Wisconsin

Civil Action No. 58–C–77

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, PLAINTIFF, EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES; NATIONAL LIVESTOCK PRODUCERS ASSOCIATION; AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION; NATIONAL WOOL GROWERS ASSOCIATION; AND CHICAGO PRODUCERS COMMISSION ASSOCIATION, INTERVENING PLAINTIFFS

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; AND NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANTS, OREGON ELECTRIC RAILWAY COMPANY; OREGON TRUNK RAILWAY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; AND THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, INTERVENING DEFENDANTS

March 25, 1960

Before HASTINGS, *Chief Judge,* U.S. Court of Appeals, and TEHAN, *Chief Judge,* and GRUBB, *District Judge.*

GRUBB, *District Judge.* This action was brought by the Chicago, Milwaukee, St. Paul and Pacific Rail-

road Company against the United States of America, the Interstate Commerce Commission, the Spokane, Portland and Seattle Railway Company, the Great Northern Railway Company, and the Northern Pacific Railway Company under 28 United States Code, Sections 1336, 1398, 2284, and 2321–2325, inclusive, to set aside and enjoin an order of the Interstate Commerce Commission dated May 10, 1957.

On February 16, 1954, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee") filed with the Interstate Commerce Commission a complaint which, as amended, alleged that the refusal of the Spokane, Portland and Seattle Railway Company (hereinafter referred to as the "S.P. & S.") to establish through routes and joint through rates in connection with the complainant applicable to freight traffic of whatsoever nature moving between points on the S.P. & S. on one hand and points throughout the United States on the other via the City of Spokane resulted in violations of Sections 1(4), 3(1), and 3(4) of the Interstate Commerce Act.

The complaint then asked the Commission to require the S.P. & S. to establish through routes and joint rates via Spokane in connection with the complainant applicable to all freight traffic where such do not already exist via the aforementioned gateway on the same basis as may now or hereafter be available from and to S.P. & S. points over routes through the Spokane gateway in connection with the Great Northern Railway Company and the Northern Pacific Railway Company (hereinafter referred to collectively as the "Northern Lines" and separately as the "Great Northern" and the "Northern Pacific").

The Commission rejected the claims of the complainant and denied all of the relief sought. At page

498 of its report (300 I.C.C. 453), the Commission found:

> 1. That the S.P. & S. system is operated under a common management and control with, and that its traffic policy is controlled by, the Great Northern and the Northern Pacific, and therefore must be considered as a part of the latter carrier systems.
>
> 2. That the failure and refusal of the S.P. & S. to join in the establishment of through routes and joint rates via Spokane in connection with the Milwaukee and its connections, the same as apply via Spokane in connection with the northern lines and their connections, does not result in discrimination against the Milwaukee, nor in undue preference or prejudice between shippers or localities.
>
> 3. That it is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the S.P. & S. system and the Milwaukee and its connections via Spokane the same as apply in connection with the S.P. & S. system and the northern lines and their connections via Spokane.

The Commission further found that with certain limited exceptions, there are no existing through routes as that term is used in the Interstate Commerce Act in connection with the S.P. & S. and the Milwaukee via Spokane.

The S.P. & S. is a common carrier by railroad incorporated under the laws of the State of Washington. It owns all of the capital stock of the Oregon Electric Railway Company and all of the capital stock, except qualifying shares, of the Oregon Trunk Railway. Collectively the three railroads are known as the Spokane, Portland and Seattle Railway

System (hereinafter referred to as the "S.P. & S. System").

The S.P. & S. System lines lie entirely within the States of Oregon and Washington, and the eastern terminus of its tracks is Spokane, Washington. At that point physical track connections with the Milwaukee, Great Northern, and Northern Pacific are available. The lines of the S.P. & S. and its subsidiaries approximate 950 miles in length. The Northern Lines each own 50 per cent of the capital stock and outstanding bonds of the S.P. & S.

The Milwaukee is a common carrier by railroad incorporated under the laws of the State of Wisconsin. It operates approximately 10,600 miles of railroad in the States of Washington, Idaho, Montana, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Michigan, Wisconsin, Illinois, and Indiana. Generally speaking it might be said that its lines serve the Pacific Northwest on the one hand and the Middle West on the other. Although it does serve Spokane, the main line of its Pacific coast extension bypasses that point.

The Northern Pacific and the Great Northern are both common carriers by railroad and are incorporated under the laws of the States of Wisconsin and Minnesota, respectively. Each operates through the northern tier of States between the North Pacific coast on the west and Minneapolis and St. Paul and the head of the Great Lakes on the east. Spokane is on the main transcontinental routes of each of the Northern Lines.

The parties have agreed that the principal issues in this case are as follows:

1. Did the Commission err in finding and concluding that the S.P. & S. System is operated in conjunction and under a common management and control

with the Northern Lines within the meaning of Section 15(4) of the Interstate Commerce Act?

2. Did the Commission err in finding and concluding that with certain exceptions there are no through routes between points on the S.P. & S. System on the one hand and, on the other, points throughout the United States generally east of Spokane and Canada in connection with the Milwaukee via Spokane?

3. Did the Commission err in finding and concluding that it is not necessary or desirable in the public interest in order to provide adequate and more efficient or more economic transportation to require the establishment of through routes and joint rates with reference to certain commodities in connection with the S.P. & S. System and the Milwaukee and its connections via Spokane the same as apply in connection with the S.P. & S. System and the Northern Lines and their connections via Spokane?

4. Did the Commission err in finding and concluding that the refusal of the S.P. & S. System to participate in joint rates with the Milwaukee and its connections similar to those in effect with the Northern Lines and their connections was not a violation of Sections 1(4), 3(1), or 3(4) of the Act?

In respect to the first issue, the power of the Commission to establish through routes and joint rates under Section 15(3) of the Interstate Commerce Act is limited by Section 15(4). The pertinent portions of these statutes read as follows:

> SECTION 15(3): "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers sub-

ject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

SECTION 15(4): "In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, *to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route,* (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *." [Emphasis added.]

It is the contention of the plaintiff that as the extreme eastern terminus of the lines of the S.P. & S. System is Spokane, the establishment of the through routes and joint through rates sought via that point would not deprive the S.P. & S. of any portion of its line haul, and that, therefore, the provisions of Section 15(4) are not applicable. On the other hand, the S.P. & S. and the Northern Lines contend that the former railroad is operated in conjunction with and under the common management and control of the latter railways and that if the plaintiff prevails, the Northern Lines, in conjunction with the S.P. & S., would be "short-hauled" in contravention of the Act.

The first matter considered by the Commission in regard to the issue of common management and control was the factual relationship between the S.P. & S. and the Northern Lines. Without repeating the detailed findings of fact of the Commission (see pages 463–467 of 300 I.C.C. 453), it can be fairly stated that while neither the Northern Pacific nor the Great Northern can individually control the S.P. & S., the Northern Lines certainly can and do collectively (or jointly) control their subsidiary including its traffic policy.

The question presented then is whether joint control by two railroads over a third railroad falls within the long haul protection of Section 15(4). In this latter respect there is no question but that the language of the statute is framed in the singular, and, therefore, such a situation does not fall within the precise wording of the Act.

The plaintiff contends that such joint or collective management and control is not sufficient to invoke the long haul protection of Section 15(4) for "control" as used in that statute must be construed as complete or dominating legal control. Such a construction would, of course, limit the long haul protection of Section 15(4) to situations where a single railroad owns at least a majority of the stock of a subsidiary railroad.

In support of its contention the plaintiff points to the legislative history of the Interstate Commerce Act and specifically to the enactment of Section 1(3)(b) in 1940. This section reads as follows:

> For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to in-

> clude actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

The Congressional purpose in enacting this statute was to make applicable to specific sections of the Act the Supreme Court's interpretation in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, of the term "control" as used in Section 2 of the Communications Act. In H. Rep. 2832, 76th Cong., 3d Sess., the joint Senate-House Conference Committee made the following comments in regard to this amendment of the Act:

> This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of "control" which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term "person" is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.
>
> The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1)(a) and section 15(4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applied of the phrase "controlling, controlled by, or under common control with" a carrier. This phrase has been used because it has re-

> cently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corporation* v. *United States*, * * *.

The plaintiff argues that since this broader definition of "control" was not applied to Section 15(4), Congress did not intend to extend the protection of Section 15(4) to a situation where two or more railroads jointly manage and control a third. The weakness of such a contention is (1) it is clear that Congress did not have such a situation in mind when it considered this legislation, and (2) Congress has expressly set out the reason it did not broaden the scope of the word "control" in Section 15(4).

As stated in the Committee report, Section 1(3)(b) was enacted to conform the definition of "control" as used in certain sections of the Interstate Commerce Act to the interpretation placed upon it in the *Rochester Telephone Corporation* decision. In that case the question considered was simply whether a single stockholder with substantial but not majority stock holdings could be said to be in control of a corporation either directly or indirectly. The situation in the present case where two railroads each own 50 percent of the outstanding stock of a third railroad and obviously exercised joint control is not even analogous to the facts of the *Rochester Telephone Corporation* case.

In our opinion the significant fact in the enactment of Section 1(3)(b) is not the express exception of Section 15(4) from the broadened definition of "control" but the reason given therefor—that Congress thought it "undesirable to make any change in the interpretation" of Section 15(4). The interpretation so referred to resides in the decisions of the Interstate Commerce Commission prior to the year 1940 which clearly show that the Commission would inter-

pret the phrase "under common management or control" to include a joint ownership situation such as we have in the instant case when such a case was presented to it.

In *Blackshear Mfg. Co.* v. *Atlantic Coast Line R. Co.*, 87 I.C.C. 654, a rate-making case not involving Section 15(4), the following statement is found:

> It should be understood that where the term "carriers under the same management and control" is used in this report, it refers to carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained.

In subsequent rate cases the Commission continued to use control of traffic policy as its criterion in judging whether railroads should be considered under the same management and control for rate-making purposes. *Humbard Construction Co.* v. *Southern Ry. Co.*, 161 I.C.C. 38; *Livestock To, From, and Between Points in the Southeast*, 91 I.C.C. 292; *Raleigh Freight Traffic Bureau* v. *A.C.L. R.R. Co.*, 107 I.C.C. 156; *Justice Co.* v. *Holton I-U Ry. Co.*, 153 I.C.C. 673; *Rates on Chert, Clay, Sand and Gravel Within Georgia*, 197 I.C.C. 215; and *Roth Blum Packing Co.* v. *Southern Pacific Co.*, 204 I.C.C. 93.

There are also a number of Interstate Commerce Commission decisions in which that body has applied the *Blackshear* definition of management and control to Section 15(4) cases where the long haul protection of that statute has been invoked and common management and control was an issue. *Alabama T. & N.R. Corp.* v. *Southern Ry. Co.*, 148 I.C.C. 708, and *Georgia & F.R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489.

In addition to these cases involving Section 15(4), the *Blackshear* definition of management and control was also used in a case involving discrimination under

Section 3(4) of the Act. *Seaboard Air Line Ry. Recs.* v. *Carolina & Northwestern Ry. Co.*, 204 I.C.C. 416. Although not a Section 15(4) case, the decision is nonetheless important for the Commission recognized that retention of the long haul by railroads under common management and control as defined in the *Blackshear* case was not a violation of Section 3(4). The plaintiff has conceded that there can be no violation of Section 3(4) if the defendant railroads are under common management or control as prescribed in Section 15(4).

In another line of Interstate Commerce Commission decisions, the Commission has held that for rate-making purposes one railroad can be jointly managed and controlled by two other independent railroads. *Russ Market Co.* v. *Northwestern Pacific R. Co.*, 171 I.C.C. 117; *Des Moines Union Railway Switching*, 231 I.C.C. 631; *Eriksen* v. *Ann Arbor R.R. Co.*, 102 I.C.C. 374; *Pacific Lumber Co.* v. *Northwestern Pacific R. Co.*, 51 I.C.C. 738; and *Roth Blum Packing Co.* v. *Southern Pacific Co.*, 204 I.C.C. 93.

In this respect it might also be noted that the Commission has commented in a number of decisions that the S.P. & S. for rate-making purposes must be considered as part of the Northern Lines rather than an independent railroad. *Portland Chamber of Commerce* v. *Oregon & Nav. Co.*, 19 I.C.C. 265; *City of Astoria* v. *S.P. & S.*, 38 I.C.C. 16; *Inland Empire Shippers League* v. *Director General*, 59 I.C.C. 321; *West Coast Lumbermen's Association* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 129 I.C.C. 363; *S.P. & S. Railway Company & Oregon Trunk*, 41 I.C.C. Valuation Reports 1; *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern Railway Co.*, 198 I.C.C. 642; and *Helix Milling Co., Inc.* v. *Great Northern Ry. Co.*, 287 I.C.C. 77.

In the first case cited the Commission stated at page 283:

> So far as these proceedings are concerned, we believe this road (S.P. & S.) must properly be considered a part of the Northern Pacific and Great Northern systems rather than as an independent line. It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific.

The holdings in the above-cited Interstate Commerce Commission decisions can be summarized as follows:

1. Control of traffic policy is tantamount to management or control in *rate cases.*

2. Two competitive railroads can jointly manage and control a third railroad by controlling traffic policy insofar as *rate cases* are concerned.

3. Control of traffic policy is also used as the definition of management or control in Section 15(4) cases.

Implicit in these holdings of the Interstate Commerce Commission are two concepts: (a) Control of traffic policy is decisive in questions of management and control, and (b) two independent railroads can jointly manage and control a third. In addition, these two concepts have been applied on two levels: (1) Rate-making cases, and (2) cases involving Section 15(4). So far the Commission has applied both concepts on the rate case level but has applied only the traffic policy control concept on the Section 15(4) level. This application of the traffic policy control concept to the Section 15(4) level has been tacitly approved by Congress because of its statement in 1940 to the effect that it did not want to interfere with the prevailing interpretation of Section 15(4).

The only remaining question then is whether Congress would also approve of the application of the second concept, i.e. joint management and control by two competitive railroads to the Section 15(4) level. Because of considerations which will be set out in detail below, this court is of the opinion that Congress did intend to cover the present situation when it used the words "under common management or control" in Section 15(4) of the Interstate Commerce Act.

It will be noticed that the Commission has used the same test in regard to management and control, i.e. control of traffic policy in every situation it has met so far. In other words, the Commission has followed a definite pattern, and it is only reasonable to assume that Congress would expect the Commission to continue to follow this pattern in the future.

The logic of such an assumption is buttressed by the fact that both of the concepts mentioned above have been applied on the rate case level. If at this point one of these concepts is used on the Section 15(4) level and the other rejected, the consistency of the overall plan of railroad regulation would be disturbed. For example, since joint management and control is recognized on the rate case level, the subsidiaries involved in such a situation would not be allowed weak line arbitraries. Arbitraries are differentially higher rates which are allowed to so-called short or weak line railroads in addition to rate scales prescribed for general application. In *Rate Structure Investigation,* Part 13, Salt, 197 I.C.C. 115, 181–182, the Commission stated:

> It has been the almost uniform practice to give all of these lines, other than those that are under common control or management with some standard carrier, arbitraries in addition

> to the scales prescribed for general application, and the same course is here warranted.

In addition, the Commission has usually prescribed two distance scales. One is a single line rate scale for application over a single railroad or over two or more lines under the same management and control. The other is a higher joint line scale which applies when the lines embraced in the routes were not under common management and control. In *Livestock To, From, and Between Points in the Southeast,* 101 I.C.C. 105, 107, the Commission stated:

> * * * we have almost invariably required lines under a common management and control to apply the single-line rates. These decisions were based on the fact that such management and control result in certain benefits in operation, and on our opinion that the single-line rates would be reasonable for application over such lines.

If the long haul of railroads in a joint management and control situation is not protected by Section 15(4), the very benefits which the Commission regards as preventing them from charging higher joint-line scales or arbitraries, i.e. the economies of joint operation, will be taken from them. Clearly, such a result would be inconsistent.

The obvious purpose of Section 15(4) is to allow a carrier to protect its long haul not only over its own route but over that of a closely associated affiliate. The decision of the Commission in this case is consistent with this purpose, and there has been no sound reason, economic or otherwise, advanced why two joint owners are not any less in need of long haul protection than a single railroad which controls a subsidiary.

Section 15(4) contains a provision which nullifies the long haul protection normally afforded by the

statute when the Commission finds that through routes are needed in order to provide adequate and more efficient or more economical transportation. Thus, although no real reason has been put forward why joint ownership of a subsidiary plus long haul protection are inherently wrong, the Commission is always in a position by virtue of this exception to see that no one is prejudiced by such an arrangement.

Another point to be considered is the relationship of Section 3(4) of the Act to Section 15(4). The former statute deals with discrimination between railroads, and the plaintiff has conceded that if the S.P. & S. is under the common management or control of the Northern Lines within the meaning of Section 15(4), then the refusal of the S.P. & S. to accord the Milwaukee equal treatment does not constitute a violation of Section 3(4). See *Atlantic Coast Line R. Co.* v. *Cape Fear Rys., Inc.*, 218 I.C.C. 152; *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I.C.C. 127; and *Seaboard Air Line Ry. Recs.* v. *Carolina & Northwestern Ry. Co.*, 204 I.C.C. 416.

Viewed in the light of this relationship between the two sections, the decision in *Louisville & Nash. R.R. Co.* v. *United States*, 242 U.S. 60, strongly supports the views of the Commission in the case at bar. In that decision which involved the use of switching facilities, the court was considering a question of discrimination under the forerunner of Section 3(4). In its opinion the court stated that if either of the joint owners of these switching facilities was the sole owner, discrimination would be impossible because the section as then constituted stated that the Act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." The court then ruled that "* * * what is true of one owner

would be equally true of two joint owners, * * *." It should be noticed that this statement was made even though the literal words of the section are singular in meaning.

In the instant case there is also a situation presented where if there were only one owner there could be no possible discrimination. In the case at bar this is so because of the presence of Section 15(4). In the *Louisville* case it resulted from the wording of the forerunner of Section 3(4). In other words, although the reasons for the impossibility of discrimination in a single owner situation are different, the result is still the same.

Thus, if it could be said that the *Louisville* decision is controlling on the question of discrimination in the present case, which issue this court does not decide, however, it would seem to follow that the S.P. & S. is under the common management and control of the Northern Lines within the meaning of Section 15(4) because of the relationship between that statute and Section 3(4). It is obvious that these sections must be read together for any inconsistency between the two would be untenable.

The plaintiff in this action has cited four Interstate Commerce Commission cases which it claims refutes the possibility of joint management and control by multiple owners. These are: *Absorption of Switching Charges of Alton & S. R.R.*, 157 I.C.C. 129; *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.*, 172 *I.C.C.* 554; *Justice Co.* v. *Holton I-U Ry. Co.*, 153 I.C.C. 673; and *Oklahoma Portland Cement Co.* v. *Kansas City S. Ry. Co.*, 188 I.C.C. 464.

The first two cases, due to their very short treatment of the issue of common management and control and because of the very large number of participants, are not persuasive on this issue. The latter decisions,

on the other hand, are of little or no value for the fact situations are radically different from that of the case at bar.

Based on the foregoing authority, this court is of the opinion and now holds that the Commission was correct in concluding that the S.P. & S. System is operated in conjunction and under a common management and control with the Northern Lines within the meaning of Section 15(4) of the Interstate Commerce Act.

In respect to the issues numbered 2, 3, and 4 as set out previously in this opinion, the court is of the opinion after a careful review of the record and now holds that the findings of the Commission as to these issues are supported by substantial evidence and, thus, should not be disturbed.

Injunction denied and plaintiff's complaint dismissed.

JOHN S. HASTINGS,
Chief Judge,
U.S. Court of Appeals.
ROBERT E. TEHAN,
Chief Judge,
U.S. District Court.
KENNETH P. GRUBB,
U.S. District Judge.

APPENDIX B

The following are the relevant provisions of the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1958 ed. § 1 *et seq.*):

§ 1(3). Definitions.

* * * * *

§ 1(3)(b). For the purposes of sections 5, 12 (1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

* * * * *

§ 1(4). Duty to furnish transportation and establish through routes; division of joint rates.

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chap-

ter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * *

§ 3(1). Undue preferences or prejudices prohibited.

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

§ 3(4). Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between

their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * * * * *

§ 5(2)(a). Unifications, mergers, and acquisitions of control.

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * * *

§ 6(1). Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. * * *

* * * * *

§ 15(1). Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and em-

powered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

§ 15(3). Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not en-

gaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

§ 15(4). Through routes to embrace entire length of railroad; temporary through routes.

In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by

the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

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